STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2006
v	No. 258066 Oakland Circuit Court
DANIEL JAMES WELLMAN, Defendant-Appellant.	LC Nos. 2004-195263-FH; 2004-195321-FC

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and MCL 750.520c(1)(b). He was additionally charged with three counts of first-degree criminal sexual conduct, MCL 750.520b(1), but the jury was unable to reach a verdict on those charges. He was sentenced concurrently to 6 to 15 years' imprisonment for each conviction. He appeals as of right, challenging his sentences because of the trial court's offense variable scoring under the sentencing guidelines. In denying defendant's objections to the guideline scoring, the trial court neither gave reasons for its denial of the objections, nor made findings of fact in support of the scoring. We vacate defendant's sentences and remand for resentencing.

Defendant, the long-time boyfriend of the victim's mother, lived with the victim and her family. When the victim was 11 or 12 years old, during the summer of 2000, defendant took her into their basement and put his fingers on or in her vagina. Defendant told her not to tell her mother. Defendant sexually assaulted the victim on other occasions after that time, including putting his mouth between her vaginal lips while they were in an attic at his shop and, on two occasions, putting his penis on top of her vagina. The last time defendant engaged in sexual contact with the victim was in May 2003, when defendant attempted penile penetration of the victim's anus. No penetration occurred because she complained of pain. Thereafter, the victim engaged in an act of fellatio with defendant.

Defendant initially denied any sexual contact with the victim. He later told the police, however, about two separate incidents involving the victim. Defendant claimed that he was awakened from a nap when someone started "playing with" and "rubbing" his penis. He discovered that it was the victim, and he sent her away. He subsequently told her that she could not engage in such conduct. On another occasion, defendant woke up to find the victim's head near his penis. His penis was wet, and he assumed that she had placed it in her mouth.

On appeal, defendant raises several sentencing issues. Defendant first argues that the scoring of several offense variables (OVs) was improper because the trial court scored them without factual findings proven to the jury beyond a reasonable doubt. Defendant argues that the trial court's fact-finding for sentencing purposes was impermissible pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). All of the sentencing issues are preserved because defendant raised them before the trial court at sentencing.

In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court noted that *Blakely* involved a determinate sentencing system unlike Michigan's indeterminate sentencing system and, therefore, *Blakely* is inapplicable to Michigan's sentencing system. We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005); see also *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005), lv pending. In *Booker*, like *Blakely*, a determinate sentencing system, specifically the federal sentencing guidelines system, was at issue. The Court determined that there was no distinction of constitutional significance between the federal sentencing procedure and the Washington state procedure addressed in *Blakely*. *Booker*, *supra*, 160 L Ed 2d at 643. Because the *Booker* Court did not address an indeterminate sentencing scheme, it is no more applicable to Michigan's indeterminate sentencing scheme than *Blakely*. Because the holdings in *Booker* and *Blakely*, *supra*, which encompass the holdings from *Apprendi*, *supra*, do not apply to sentences imposed in Michigan, we reject defendant's claim that the trial court denied defendant his constitutional rights in violation of the rules of law set forth in those cases.

Defendant next argues that the trial court improperly scored 50 points for OV 11, MCL 777.41. A trial court's imposition of a sentence within the legislative guidelines range must be affirmed absent an error in scoring or reliance on inaccurate information. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10).

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. 'Scoring decisions for which there is any evidence in support will be upheld.' [*People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (internal citations omitted).]

OV 11 provides that 50 points should be scored if there are two or more criminal sexual penetrations. MCL 777.41(1)(a). However, the instructions for OV 11 further provide:

> All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender *arising out of the sentencing offense*.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 and 13.

(c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41(2) (emphasis added).]

The language of the statute instructs that all penetrations *of the victim arising out of the sentencing offense are scored.* The phrase "arising out of the sentencing offense" refers to penetrations arising out of the "entire assault" making up the sentencing offense. *People v McLaughlin*, 258 Mich App 635, 674-676; 672 NW2d 860 (2003). Penetrations that occur at the same place, under the same set of circumstances, and during the same course of conduct as the sentencing offense may be scored under OV 11. *People v Mutchie*, 251 Mich App 273, 276-277; 650 NW2d 733 (2002), *McLaughlin, supra* at 674 n 16. In this case, the sentencing offense for which the guidelines were scored was second-degree criminal sexual conduct, MCL 750.520c(1)(b) (victim between the ages of thirteen and sixteen and defendant being a member of the same household).[1] But the particular act of second-degree criminal sexual conduct on which the conviction was based is not clear from the record. The victim testified to multiple acts of sexual contact. Nevertheless, there was no evidence that two or more acts of penetration occurred at the same place, under the same set of circumstances, and during the same course of conduct as any of the acts of second-degree criminal sexual conduct about which the victim testified. For that reason, the trial court erred in scoring 50 points for OV 11.[2]

Defendant also argues that the trial court erred in scoring OV 13, MCL 777.43, at 25 points. The instructions for OV 11, MCL 777.41(2)(b), provide that "[m]ultiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 and 13." However, any sexual penetrations scored under OV 11, may only be considered under limited circumstances under OV 13. Offense Variable 13 accounts for continuing patterns of criminal behavior. MCL 777.43(1). Twenty-five points are scored where the sentencing offense is "part of a pattern of felonious criminal activity involving 3 or more crimes against a person," and are not scored under OV11.[3] MCL 777.43(1)(b). When scoring OV 13, all crimes within a five-year period are counted, including the sentencing offense, "regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Again, conduct that is scored in OV 11 or OV 12, MCL 777.42, may not be considered. MCL 777.43(2)(c). In this case, there was evidence that defendant committed numerous sexual assault crimes against the victim between July 2000 and May 2003. She testified about three sexual penetrations during that time period and testified about several other acts of criminal sexual

[1] While defendant was also convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen years of age), a guideline sentencing information report or presentence information report for multiple concurrent convictions is only required for the one conviction of the highest crime class. Here, the convictions are of the same class. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005).

[2] On resentencing the trial court must assess the record on the issue of single penetration as contemplated in OV 11, MCL 777.41(1)(b) and the assessment of 25 points. Because of the general verdict, it may prove impossible to assign a specific penetration to a sexual contact.

[3] We are not concerned here with the organized crime group exception.

contact. This conduct cannot properly be scored under OV 11 and, therefore, may be considered in scoring OV 13. The score of 25 points for OV 13 was appropriate under the circumstances.

Finally, defendant argues that the trial court erred in scoring OV 4, MCL 777.34, at ten points. Ten points are scored for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to the victim." MCL 777.34(1)(a). Ten points should be scored if the "serious psychological injury may require professional treatment," and the fact that treatment is not sought is not conclusive when scoring the variable. MCL 777.34(2). At sentencing, the prosecutor asserted that she had information that the victim was in counseling and, even if she were not, OV 4 should be scored at ten points based on the circumstances of the case and the charges involved. The trial court denied defendant's challenge to the scoring of ten points without specifying a reason.

We conclude that there was evidence to support the scoring of OV 4. The victim was subject to numerous sexual assaults by her mother's boyfriend over a period of years, withheld this information from her mother because she was afraid of her mother's reaction, was accused of lying by her mother after finally making her disclosure, could not articulate how she felt about defendant, and believed that she was at fault because she was willing to go along with some of defendant's actions. The victim believed that she would benefit from counseling. This information supports a score of ten points for OV 4. It indicates that the victim suffered serious psychological injury warranting counseling, especially where she was confused about the issue of fault with respect to the offenses. We note that the victim's mother reported that the victim suffered no emotional or physical damage as a result of the criminal conduct. This fact is not conclusive with respect to the scoring of OV 4 because the record reveals that the victim's mother has continued to accuse the victim of fabrication with respect to defendant's crimes.

Although we have found that the trial court only erroneously scored OV 11, the error requires resentencing. The scoring of OV 11 at 50 points affected the minimum sentence range under the legislative guidelines. Second-degree criminal sexual conduct is a Class C crime. MCL 777.16y. The minimum sentence ranges for Class C felonies are set forth in MCL 777.64. As scored at sentencing, defendant had a total offense variable score of 95 points, placing him in offense variable level VI, which, combined with his prior record variable level C, resulted in a minimum sentence range of 43 to 86 months. When the offense variable score is reduced by 50 points, defendant's total OV score would be 45 points, placing him in offense variable level IV, resulting in a new minimum sentence range of 29 to 57 months. MCL 777.64. Defendant was sentenced to a minimum term of six years, which is outside that range.[4]

Remanded for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

[4] To be clear, we are not establishing defendant's sentence range. That is for the trial court to determine at resentencing after considering all factors, proof, and evidence.